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OCTOBER TERM, 1950

No. 109

MARTIN L. WHELCHEL, *Petitioner,*

vs.

A. McDONALD, WARDEN OF THE FEDERAL CORRECTIONAL INSTITUTION AT TEXARKANA, TEXAS

PETITION FOR REHEARING

HUGH CARNEY,
Counsel for Petitioner.

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Respondent

PETITION FOR REHEARING

TO THE HONORABLE COURT:

Now comes petitioner and files this his Motion for Rehearing and would respectfully ask the Court to set aside the judgment of December 4, 1950, and grant a rehearing herein for the following reasons, to-wit:

Petitioner realizes that this Court is burdened with litigation and hesitates to take up the time of the Court in asking a reconsideration of this case, but we feel that the Court in this case, as it has in two or three other cases just prior to this case dealing with judgments of Courts-Martial, has departed from the settled law as laid down by this Court in former cases and has narrowed the scope of habeas corpus to a point where the provisions in the Constitution of the United States providing for writs of habeas

corpus have been nullified so far as an enlisted man convicted by Court-Martial is concerned.

The Court in this case, as it has in these other cases, has held that, before a petitioner can have any relief, he must show that the court was without jurisdiction. We think that is a highly erroneous proposition of law and one not borne out by the decrees of this Court prior to the recent cases of *Humphrey* v. *Smith*, 336 U. S. 695, and *Hiatt* v. *Brown*, 175 F. (2) 273.

The former principles with reference to relief by writ of habeas corpus are expressed by this Court in *Johnson* v. *Zerbst*, 304 U. S. 458, 58 Supreme Court 1019, as follows:

> "These principles, however, must be construed and applied so as to preserve—not destroy—constitutional safeguards of human life and liberty. The scope of inquiry in habeas corpus proceedings has been broadened—not narrowed—since the adoption of the Sixth Amendment . . . and the court upon determining the actual facts is to 'dispose of the party as law and justice require.'"

Also, in the case of *Price* v. *Johnson*, 334 U. S. 266, we quote as follows:

> "Moreover, the principle has developed that the writ of habeas corpus should be left sufficiently elastic so that a court may, in the exercise of its proper jurisdiction, deal effectively with any and all forms of illegal restraint. The rigidity which is appropriate to ordinary jurisdictional doctrines has not been applied to this writ."

We can see no foundation in law for the Court's holding. There is nothing sacred about a judgment of Court-Martial. In fact, it has always been held that a Court-Martial is an inferior court and its decrees might be collaterally attacked anywhere. *Runkel* v. *United States*, 122 U. S. 543. The doc-

trine of want of jurisdiction to set aside a decree of a court has heretofore been applied to judgments of courts of record, and, in spite of this well established doctrine, this Court has many times refused to be bound by the rigidity of the lack of a jurisdictional showing to set aside a judgment wherein a man has been deprived of some of his constitutional rights, as have under the cases where this Court has not hesitated to go behind a finding of a court of record—a District or Circuit Court—where there was not only a judgment of court, but a finding of the jury that his confession was voluntary, and set the judgment aside, because it appeared to this Court, from the facts, that the confession was not voluntary. In all those cases the court could have side stepped the question of whether or not the defendant had been denied his right by saying that the trial court had jurisdiction and had found the facts against the petitioner. So why should this Court now at this late date, after so many years of upholding the rights of a man seeking relief under a writ of habeas corpus, be based solely upon a showing of lack of jurisdiction of the trial court.

We note in the opinion the Court says, "The defense of insanity was not raised, however, either at the pretrial investigation or the trial itself." That is true, but should an insane man be charged with the duty of raising an issue of his own insanity. Surely this Court, or any other court, would not hold that a man who was insane and knew nothing at all of the whole procedure, as was testified by Dr. Pellettieri, would have the knowledge necessary to raise such an issue. Nor could his lawyer raise it at the trial, because it is shown now, undisputedly, that his attorney knew nothing of the man's insanity. He did find it out within ten days after the judgment and made his application to the reviewing authorities for the relief granted by Article 87b. Had he found it out while the trial was in progress,

he would have invoked Article 63 of the Court-Martial Code, as follows:

> "The court will inquire into the existing mental condition of the accused whenever at any time while the case is before the court it appears to the court for any reason that such inquiry ought to be made in the interest of justice. Reasons for such action may include anything that would cause a reasonable man to question the accused's mental capacity either to understand the nature of the proceedings or intelligently to conduct or to co-operate in his defense."

Counsel for the petitioner asked that petitioner be given a thorough neuropsychiatric examination. The Court, in its opinion, evidently realizes that petitioner should have had a hearing on the issue of insanity somewhere in the proceedings, because the Court says, "we think it plain from the law governing court-martial procedure that there must be afforded a defendant at some point of time an opportunity to tender the issue of insanity." We certainly agree with the Court in that statement, and we say that this record shows that the defendant has never had an opportunity to tender the issue of insanity. He himself could not do it before the investigating authorities because he was insane. His lawyer could not do it before the Court-Martial during the trial because he knew nothing of it, and the only way it could have been determined and the petitioner could have had an opportunity to have the issue of insanity settled, was by the provisions of Article 87b, under which the reviewing authorities should have granted the request of his counsel for a thorough psychiatric examination. That was not done and it will not suffice to say that, thereafter, the reviewing authorities considered this question; because they had no facts upon which to go. The petitioner had lost his opportunity to present to them evi-

dences of his insanity from the thorough psychiatric examination that should have been given him under Article 87b, But the respondent says that he had had one psychiatric examination. True enough, but it was an incomplete examination. It was made on ignorance of facts, which afterwards were presented to the reviewing authorities, and which was shown not to have ever been presented to Captain Segal, who made the preliminary examination. Captain Segal knew nothing of the fact that this man had cracked up, as shown by testimony of Sergeant Goolsby and Captain Graham, some two weeks before this rape occurred. Captain Segal knew nothing of the fact, as shown on trial on the writ of habeas corpus, that petitioner's father and grandfather both had been insane, and, yet, in spite of the fact that Captain Segal was without this most potent information, he called it a "borderline case" and resolved the doubt against petitioner. By the failure to have this thorough psychiatric examination made of the petitioner at that time, there was forever lost the opportunity for petitioner to prove that he was actually insane.

The Court says that petitioner had further consideration by the military authorities of the insanity issue which he tenders. Sure, but not one single shred of evidence is shown that they had other than the first and only psychiatric examination of petitioner made by Captain Segal in the preliminary investigation.

The Court says that since no showing was made of the availability of a member of the Judge Advocate General's Department, there was no gross abuse of discretion. We think a sufficient showing was made, because in the motion for rehearing before the Circuit Court of Appeals, petitioner having discovered for the first time that the counsel appointed for the petitioner at his trial before the Court-Martial was not a lawyer, and in the same petition alleged

that the Judge Advocate General's Department did not aver the fact that, while the law member was not a member of the Judge Advocate General's Department, there was no member of such Department available to act as law member, so, therefore, because the Judge Advocate General, after admitting that counsel was not a member of the Judge Advocate General's Department, failed to assert that there was no available member, therefore, under the usage and proceedings in a trial, a party charged with a fact which is wholly within the party's knowledge, does not deny, must be held to have that fact established against him. In *Hiatt vs. Brown*, 175 F. (2) 273, this Court held that it was immaterial and did not deprive the petitioner of such a right as would authorize the setting aside of the judgment, because it was not jurisdictional. We don't know whether it was shown in *Hiatt* v. *Brown* or not that, had counsel been a member of the Judge Advocate General's Department, there would have been any difference in the trial, but here in this case we can see the importance of having a defendant in the Court-Martial case represented by a trained lawyer. Had petitioner Whelchel been so represented, no doubt the lawyer, with his training, would have discovered, as petitioner's counsel did not, that petitioner was insane while the trial was still in progress before the Court-Martial and would have set up such fact and made an issue of it and invoked Article 63 of the Court-Martial Code. Thus the fact that the petitioner in this case did not have as his counsel a member of the Judge Advocate General's Department resulted in a grave and serious injury to him and, therefore, is such as would require this Court to reverse the judgment of the Court-Martial and release petitioner on his writ of habeas corpus, because his trial was lacking in due process of law, which is defined by Mr.

Justice Frankfurter in *Adamson* v. *People of California*, 67 S. Ct. 1672, as follows:

> "The relevant question is whether the criminal proceedings which resulted in conviction deprived the accused of the due process of law to which the United States Constitution entitled him. Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses. These standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia."

The Court relies strongly upon the fact that the Judge Advocate General, in refusing the evidence of the insanity issue, concluded: "I entertain no doubt that Whelchel was so far free from mental defect, disease, and derangement as to be able concerning the particular acts charged both to distinguish right from wrong and to adhere to the right . . ." But the question is: Would the Judge Advocate General so have concluded had Whelchel been given the thorough psychiatric examination, asked by his attorney of the reviewing authorities, which was arbitrarily denied? Of course, it can be said that had Whelchel had that thorough psychiatric examination it might have resulted in a finding of sanity. On the other hand, it might have resulted in a finding of insanity, but the outstanding fact is the great wrong done to petitioner. The arbitrary refusal to give him that test lost forever the opportunity to know and to show to the court the exact truth.

We think that the evidence adduced before the District Court on the trial for the writ of habeas corpus showed

overwhelmingly that petitioner was insane, both, at the time of the rape and at the time of the trial. There was positive evidence by men who should know, his Captain, his Sergeant, Dr. Pellettieri, that at the time of the trial he knew nothing of it, in their opinion. They were competent to form their opinion because they had been associated with him in all that hard fighting across France and Germany at the head of Patton's army. There was no dispute on the part of the Government of this testimony other than the inconclusive psychiatric examination made by Captain Segal, which was shown to have been made on insufficient information, especially the information that petitioner had cracked-up and that his father and grandfather had been insane. This is shown by a sentence in Captain Segal's report, to-wit: "There is no family history of mental or nervous diseases but all members of the family, with the exception of the Mother, drink heavily." The result of this decision is that petitioner is probably the only man in the world ever condemned to suffer punishment on a judgment which was impeached by the court itself that tried him. Five members of the six man court that tried this man recommended that the application of Captain Matisin, counsel for petitioner, for a thorough psychiatric examination be granted. Yet, in spite of that fact, the reviewing authorities, although commanded by the provisions of Article 87b to grant that relief, arbitrarily refused to do so. Because this Court and the lower courts hold that, even though petitioner was denied his rights under the law, such denial of rights was not sufficient to be "jurisdictional."

We hope that this doctrine of necessity of jurisdictional defects will not prevail because it will shut the door of hope to three or four million other enlisted men who are at

this time being inducted into the army of the United States.

The Court says in its opinion:

> "The constitution of courts-martial, like other matters relating to their organization and administration, is a matter appropriate for congressional action."

What difference would it make about congressional action if the authorities are going to refuse to obey the provisions of the law for the benefit of the enlisted man at their will, and the courts are not going to reverse their holdings because it would not be a jurisdictional question. For instance, now that Congress has declared by law that the membership of the Court-Martial shall be composed of at least two enlisted men, if the military authorities were to say, "Well, we will convene a court-martial without the two members," and the courts will hold that it is not jurisdictional because the G. I. could not show that he suffered any injury thereby. This Court has held that the refusal of the authorities to carry out the provisions of the law with reference to a thorough preliminary investigation is not jurisdictional and, therefore, does not affect the judgment of the Court-Martial. *Humphrey* v. *Smith*, 336 U. S. 695. This Court has also held that the provisions of the law requiring that the defense counsel be a member of the Judge Advocate General's Department, where available, is not jurisdictional (*Hiatt* v. *Brown*, 175 F. (2) 273) and, therefore, where a court was impaneled and defendant tried without such counsel, there was no error because it was not jurisdictional. So we say that this jurisdictional doctrine has crept into the law as a latter day thought without foundation of authority and with gross disregard to the rights of the soldier. So far as a soldier is concerned, it means that the provisions of the Constitution of the United States allowing writs of habeas corpus and providing for

due process of law are dead letters. We hope the Court will not continue to restrict the right of habeas corpus. Rather, we hope that the Court will broaden the right as laid down in *Johnson* v. *Zerbst*, as follows:

> "These principles, however, must be construed and applied so as to preserve—not destroy—constitutional safeguards of human life and liberty. The scope of inquiry in habeas corpus proceedings has been broadened—not narrowed—since the adoption of the Sixth Amendment . . . and the court upon determining the actual facts is to 'dispose of the party as law and justice require.'"

We respectfully urge the Court to grant a re-hearing herein and reverse the judgments of the Circuit Court of Appeals and the lower court and order the Court-Martial judgment set aside and held for nought and petitioner discharged.

Respectfully submitted,

HUGH CARNEY,
Atlanta, Texas,
Counsel for Petitioner.

STATE OF TEXAS,
County of Cass:

I, Hugh Carney, respectfully certify to the Court that I am counsel for petitioner in the above styled and numbered cause, and that I, in good faith, have made the motion for rehearing and said motion is not made for delay, believing that the Court should set aside its judgment and return judgment for petitioner.

Given under my hand at Atlanta, Texas, this 20th day of December, 1950.

HUGH CARNEY.